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Supreme Court, U.S.
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No. 99-6218

IN THE
SUPREME COURT OF THE UNITED STATES

WILBERT K. ROGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED FOR REVIEW

Whether the Tennessee Supreme Court's retroactive application of its decision abolishing the common law "year-and-a-day rule" violated petitioner's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution?

OPINION BELOW

The opinion of the Tennessee Supreme Court is published at 992 S.W. 2d 393 (Tenn. 1999). The order denying rehearing (Apx. 1) is unpublished.

STATEMENT OF JURISDICTION

The opinion of the Tennessee Supreme Court was filed on May 24, 1999. The Tennessee Supreme Court denied a petition to rehear on June 21, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

In January, 1996, petitioner was convicted of second-degree murder and sentenced to 33 years. (I. 34) The Tennessee Court of Criminal Appeals affirmed the conviction. *State v. Wilbert K. Rogers (A.K.A. Person Rogers)*, No. 02C01-9611-CR-00418, 1997 WL 642309 (Tenn. Crim. App., filed October 17, 1997, at Jackson). On April 13, 1998, the Tennessee Supreme Court granted petitioner's Application for Permission to Appeal. In an opinion dated May 24, 1999, the Tennessee Supreme Court abolished the year-and-a-day rule and applied its decision retrospectively to petitioner's case.

STATEMENT OF THE FACTS

In May 1994, the defendant stabbed James Bowdery in the chest. Bowdery staggered to the apartment of Dianna Reed, reported the stabbing, and lay down on the couch. Reed called an ambulance.

Following the stabbing, Bowdery went into cardiac arrest. Before his heart

could be restarted and circulation reestablished, the defendant developed hypoxia of the brain. Bowdery survived in a vegetative state until August 1995, when he died of a kidney infection, a complication of the coma.

ARGUMENT

THE TENNESSEE SUPREME COURT PROPERLY CONCLUDED THAT THE RETROSPECTIVE APPLICATION OF THE ABOLISHMENT OF THE YEAR-AND-A-DAY RULE DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Petitioner argues that the Tennessee Supreme Court's retrospective application of its decision abolishing the common law year-and-a-day rule violated his due process rights under the Fifth and Fourteenth Amendments. To the contrary, the Supreme Court's abrogation of the year-and-a-day rule was not an unforeseeable judicial enlargement of a criminal statute; therefore, the retrospective application of the decision was proper.

The Ex Post Facto Clause of the United States Constitution is a limitation upon the powers of the legislature, *see Calder v. Bull*, 3 Dall. 386 (1798), and does not apply to the judicial branch. *Frank v. Magnum*, 237 U.S. 309, 344 (1915). However, this Court has held that the Fifth and Fourteenth Amendments forbid retroactive application of an unforeseeable judicial modification of criminal law to the disadvantage of the defendant. *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rose v. Locke*, 423 U.S. 48 (1975)

In *Bouie*, the defendants were convicted of trespassing after refusing to leave

a restaurant when an employee of the store posted a "no trespassing" sign. *Bouie, supra* at 348. The statute under which the defendants were charged defined trespass as "entry upon the lands of another ... after notice from the owner ... prohibiting such entry." *Id* at 351-352. The South Carolina Supreme Court, in affirming the defendants' convictions, interpreted the statute to proscribe remaining on the premises after being told to leave, as well as entering the premises after being notified not to enter. *Id* at 350. In this Court the defendant's argued that they were denied due process of law because the interpretation of the statute under which they were convicted punished them for conduct that was not criminal at the time they committed it, thereby depriving them of fair warning of the conduct the statute prohibited. *Id* at 350. This Court reversed the defendants' convictions, finding that they had indeed been denied due process of law by the South Carolina Supreme Court's interpretation of the statute. The Court found that the defendants "were given no warning whatever" that the conduct in which they had engaged violated the statute. *Id* at 355, 362. The Court opined that it was "a basic principle that a criminal statute must give fair warning of the conduct that it makes a crime" and that "a deprivation of fair warning can result not only from vague statutory language but also from an unforeseeable judicial expansion of narrow and precise statutory language." *Id* at 352.

In *Marks* the defendants were charged with transporting obscene materials in interstate commerce. *Marks, supra* at 189. Between the time that the defendants were

charged with the offense and the trial, this Court decided *Miller v. California*, 413 U.S. 15 (1973), which announced new standards for interpreting obscenity laws. The defendants argued in the district court that they were entitled to jury instructions under the more favorable definition of obscenity that existed prior to this Court's opinion in *Miller*. *Id* at 190. The district court overruled the defendants' objection and instructed the jury under the *Miller* standard. *Id* at 191. This Court held that the test announced in *Miller* could not be applied to the defendants because their acts were committed before the Court had announced the *Miller* test and those standards "imposed criminal liability for conduct not punishable [previously]." *Id* at 196.

In this case, the Tennessee Supreme Court properly determined that their decision to abolish the year-and-a-day rule could be applied retroactively because it was not a "judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue". *State v. Rogers*, 992 S.W.2d 393, 402 (citing *Bouie, supra*, at *354)* The court noted that the year-and-a-day rule had never been a ground of any decision in Tennessee and had only been mentioned once by the state appellate courts since 1907. *Id.* It also cited the fact that the rule had been abolished judicially or legislatively in many other jurisdictions, and had been called into question by the adoption of the 1989 Criminal Code, which in defining homicide did not include a reference to the year-and-a-day rule. *Id*.

An objective of the 1989 Criminal Code was to "give fair warning of what

conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." Tenn. Code Ann. § 39-11-101(2). It provided that "conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." Tenn. Code Ann. § 39-11-102. The Sentencing Commission Comments specifically state that "it is the intent of the commission that common law offenses be replaced with statutory offenses to effect the goals set forth in § 39-11-101(1) and (2)."

The 1989 Criminal Code defines criminal homicide as: "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter criminally negligent homicide, or vehicular homicide." Tenn. Code Ann. § 39-13-201. The year-and-a-day rule is not mentioned.

Additionally, the retroactive application of the abrogation of the year-and-a-day rule does not implicate the same notice concerns that this Court enunciated in *Bouie* and its progeny. Clearly, in this case, the defendant was aware that his conduct, *i.e.* killing another human being, was proscribed by the statute. Accordingly, this case is not controlled by *Bouie* or *Marks*, where the defendants were not on notice that the conduct in which they were engaged was proscribed by the criminal law and where the courts in question had expanded narrow and precise criminal laws to include the conduct of the defendants.

The defendant was not deprived of fair warning that the conduct in which he was engaged was criminal, therefore, he was not deprived of his due process rights when the Tennessee Supreme Court retroactively applied its decision to abolish the year-and-a-day rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been furnished to all parties required to be served in this cause by delivering a true and exact copy to the office of counsel of record shown at the address below by placing a copy in the U.S. mail, first-class, postage prepaid, on the 21st day of December, 1999.

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Michael E. Moore

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Solicitor General
Counsel of Record

APPENDIX NO. 1

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	**NOT FOR PUBLICATION**
	)	
Appellee,	)	SHELBY CRIMINAL
	)	
v.	)	NO. 02S01-9804-CR-00035
	)	
WILBERT K. ROGERS,	)	
	)	
Appellant.	)	

ORDER

The appellant has filed a petition for rehearing in this appeal pursuant to Tenn. R. App. P. 39. We have considered all of the arguments raised in the petition, and we have found them to be without merit. It is, therefore, ORDERED that the petition is denied.

PER CURIAM

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December 21, 1999

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

RE: *Wilbert K. Rogers v. Tennessee*, No. 99-6218

Dear Mr. Suter:

On December 17, 1999, the State filed it brief in opposition to the Petition for Writ of Certiorari in *Wilbert K. Rogers v. State of Tennessee.* It came to my attention today that, following my final review of the brief, the citation in *Bouie v. City of Columbia,* 378 U.S. 347 (1964) was erroneously altered throughout the brief. I have made the appropriate changes and respectfully request that you substitute the enclosed briefs for those previously submitted.

Sincerely,

Michael E. Moore

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cc: W. Mark Ward